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IN THE

Supreme Court of the United States

October Term, 1966

No. 905

CHARLES FENSTER,

Appellant,

against

HOWARD R. LEARY, as Commissioner of Police of the City of New York, and AARON E. KOOTA, as District Attorney of the County of Kings,

Appellees.

On Appeal from the United States District Court, Southern District of New York

MOTION TO DISMISS OR AFFIRM

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Statement

This is an appeal from an order of the United States District Court for the Southern District of New York, entered on December 14, 1966, denying appellant's motion for a preliminary injunction and dismissing his complaint on the ground that the Court, in its discretion, should not exercise jurisdiction of the action.

Facts

Appellant is a citizen of the United States and is a resident of Brooklyn, New York. Appellee Leary has been the Police Commissioner of the City of New York since February 21, 1966; appellee Koota is the District Attorney of the County of Kings, State of New York.

The appellant's complaint alleges that the appellant was arrested on three occasions in 1964 and charged with being a vagrant in violation of Section 887, subdivision 1 of the Code of Criminal Procedure of the State of New York (66 McKinney's Consolidated Laws of New York, Part 3). The first such arrest was on or about September 30, 1964, and the appellant was acquitted of the charge. The second arrest was on or about November 13, 1964, and the appellant was again acquitted.

The third arrest took place on December 11, 1964, and the appellant shortly thereafter commenced an action in the nature of prohibition in the Supreme Court of the State of New York in which he sought a stay of the criminal proceedings on the ground that the statute under which he was charged was unconstitutional. In *Matter of Fenster* v. *Criminal Court, N. Y.*, 46 Misc. 2d 179, 259 N. Y. S. 2d 67 (1965), the court dismissed appellant's petition saying that he had failed to show that he had a clear right to the relief sought. The dismissal was affirmed by the Appellate Division of the Supreme Court, Second Department, 24 A. D. 2d 840, 263 N. Y. S. 2d 1010 (1965), and by the Court of Appeals of the State of New York, 17 N. Y. 2d 641, 216 N. E. 2d 340 (1966).

After the affirmance by the Court of Appeals, the appellant was tried and acquitted of the charge of December 11, 1964.

Appellant then alleged in his present complaint that, during the pendency of the proceedings before the Supreme Court of the State of New York for a judgment of prohibition and the appeals from the judgment adverse to appellant therein, appellant was threatened by the police with further arrests under the vagrancy law. No places, precise dates or other circumstances are alleged in connection with the alleged threats. Appellant concluded his complaint with the allegation that he feared immediate arrest and subjection to repeated prosecutions under the vagrancy law.

Appellee Leary, however, stated in his affidavit in opposition to appellant's motions for a three-judge court and a preliminary injunction that his investigation of the allegations of the complaint revealed that no threats to arrest appellant under Section 887, subdivision 1, were made by members of the Police Department. Appellee Leary further stated that the Police Department had no intention of arresting appellant under the statute in question at the time of the making of the affidavit or at some time in the future.

ARGUMENT

The claim that the Court below erred in dismissing, in its discretion, the appellant's complaint without deciding the constitutional issues presented by appellant does not present a substantial federal question.

In a yet unreported decision, the court below in the exercise of its discretion, decided to abstain from exercising jurisdiction of the claims presented by the appellant. (The court's opinion is attached to appellant's jurisdictional statement as Appendix A.) Hence, the asserted constitutional objections to the New York vagrancy law raised by the appellant were not reached by that court.

It is well settled that federal courts have equity jurisdiction where state officers "threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution." *Ex Parte Young,* 209 U. S. 123, 156 (1908). It is also well settled, however, that "* * * considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework." *Dombrowski* v. *Pfister,* 380 U. S. 479, 484 (1965). Hence, such equitable power will be exercised in only exceptional cases "to prevent irreparable injury which is clear and imminent". *Douglas* v. *City of Jeannette,* 319 U. S. 157, 163 (1943).

In *Douglas* v. *City of Jeannette, supra,* this Court refused to enjoin the enforcement of a city ordinance saying

that the declared intention of the defendants to institute prosecutions was insufficient to establish irreparable injury "both great and immediate". Injunctive relief was denied in that case even though the ordinance there attacked had been found unconstitutional in a companion case decided the very same day as *Douglas* v. *City of Jeannette, supra.* See *Murdock* v. *Pennsylvania,* 319 U. S. 105 (1943).

In *Harrison* v. *NAACP,* 360 U. S. 167, 176 (1959), in vacating the judgment of a three-judge court enjoining officials of the Commonwealth of Virginia from enforcing certain state statutes, this Court again noted that state courts should first have the opportunity to interpret state laws "fairly open to interpretation".

Baggett v. *Bullitt,* 377 U. S. 360 (1964), and *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), do not require a departure from the doctrine of abstention in this case, but in fact demonstrate this cases' lack of those special circumstances which would justify the exercise of federal jurisdiction. In both *Baggett* and *Dombrowski* unconstitutional vagueness of the statutes attacked had the immediate effect of inhibiting the exercise of First Amendment freedoms. In addition, abstention in those cases, this Court pointed out, could result in protracted litigation without an authoritative decision by the state courts during which time the existence of the statutes attacked would abridge free expression.

In this case, the appellant does not claim that the statute is vague or that prolonged litigation in the courts of the State of New York would be required to gain a decision on

the constitutionality of the statute. Furthermore, appellant's array of constitutional arguments against the statute does not include a claim that the statute abridges free expression in violation of the First Amendment. Lastly, appellant's questioned claim of "harassment" does not begin to approach the facts presented in *Dombrowski, supra.*

Appellant appears to have an appropriate and complete remedy in an action for a declaratory judgment in the New York courts. Although the Court in *Reed* v. *Littleton,* 275 N. Y. 150, 9 N. E. 2d 814 (1937), refused to entertain a declaratory judgment action seeking construction of a criminal statute, both the dictum in that case (275 N. Y. at 153, 9 N. E. 2d at 815-816) and a more recent case appear to establish the right to such an action where the constitutionality of a criminal law is challenged by one actually threatened with prosecution under such statute. *De Veau* v. *Braisted,* 5 A. D. 2d 603, 174 N. Y. S. 2d 596 (2d Dept. 1958), aff'd, 5 N. Y. 2d 236, 157 N. E. 2d 165, 183 N. Y. S. 2d 793 (1959), aff'd, 363 U. S. 144 (1960). And, it is also clear that appellant's failure to obtain an order of prohibition in the New York courts does not require the exercise of Federal jurisdiction. Prohibition, as distinguished from declaratory judgment, was the wrong remedy. *E.g., Kenler* v. *Murtagh,* 12 A. D. 2d 662, 209 N. Y. S. 2d 384 (2d Dept., 1960) [mem.]; *People ex rel. New York Disposal Corp.* v. *Freschi,* 173 App. Div. 189, 159 N. Y. Supp. 23 (2d Dept., 1916).

Hence, the Court below properly found that the facts pleaded by the appellant did not warrant departure from

the doctrine of abstention. Not only did appellant fail to show irreparable injury "both great and immediate", he also failed to show that his remedies in the state courts are inadequate. On this showing, abstention is required under the decisions of this Court.

CONCLUSION

The appeal to this Court from the judgment of the order of the United States District Court, Southern District of New York, should be dismissed, or the judgment affirmed.

January 18, 1967

Respectfully submitted,

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